Wu Siying & 75 Ors v Malaysian Airline System Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-21NCVC-20–03 OF 2016
AZIZUL AZMI ADNAN JC
8 SEPTEMBER 2016

Civil Procedure — Discovery — Application for — Plaintiffs applied for general discovery of documents pertaining to disappearance of MH370 pursuant to O 24 r 3 of the Rules of Court 2012 — Whether application premature — Whether plaintiffs merely fishing for evidence — Whether plaintiffs' application must fail on procedural ground as no affidavit in support filed — Whether grounds of application baseless — Rules of Court 2012 O 24 r 3

This was the plaintiffs' application for general discovery pursuant to O 24 r 3 of the Rules of Court 2012 ('the ROC'). The plaintiffs submitted that the plaintiffs were in the position of information paucity, as all the documents pertaining to the disappearance of MH370 were in the possession, custody or power of the defendants. It was further submitted that the plaintiffs had reason to believe that the defendants might dispose of, conceal or destroy such documents. The issues for court's consideration were whether the application was premature; whether the plaintiffs were merely fishing for evidence; whether the plaintiffs' application must fail on a procedural ground as there was no affidavit in support; and whether the grounds of application was baseless as interim statement which contained ample facts had already been issued.

Held, allowing the application with costs:

(1) The first defendant had not pleaded that article 21(2) of the Montreal Convention 1999 ('the convention') was applicable. The first defendant appeared to have reserved its position on whether the accident was not the result of any fault on its part, or was the result of the fault of a third party. Thus, the discovery sought would not be relevant or necessary for the purpose of ascertaining the liability of the first defendant. Nevertheless, the plaintiffs' claims against the third to fifth defendants were not made under the convention, thus discovery could be ordered against the first defendant in so far as they relate to documents that were relevant for the plaintiffs' case against the third to fifth defendants (see paras 10–11).

(2) Based on the plaintiffs' statement of claim, there were sufficient pleaded facts to show that the plaintiffs did have a case that might be aided by an order of discovery, and that, as a consequence, the application for

discovery was not a mere fishing exercise. The fact pattern showed that the plaintiffs' case was not mere speculation. In examining the relevancy or materiality of the plaintiffs' application for discovery to a fact in issue, the plaintiffs' case must be assumed to be true (see paras 15 & 17).

(3) There is no requirement under O 24 r 3 of the ROC for an applicant to depose an affidavit in support of an application for general discovery. In any event, the plaintiffs had filed a notice of their intention to refer to the relevant supporting and reply affidavits that had been filed in connection with the application for specific discovery (see para 20).

(4) Apart from the interim statement, all relevant information that could possibly be used to determine the liability of the defendants were or should be in the possession, custody or power of the defendants. The interim statement itself would not be sufficient for the plaintiffs to proceed to trial. The applicable test for determining whether or not discovery ought to be granted is that set out in *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96: there must be a 'document', that document must be 'relevant' and it must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought. The court was of the view that the plaintiffs' application fulfilled this test (see paras 22 & 24).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif untuk penzahiran am menurut A 24 k 3 Kaedah-Kaedah Mahkamah 2012 ('KM'). Plaintif-plaintif berhujah bahawa mereka dalam kedudukan kekurangan maklumat, kerana semua dokumen berkaitan kehilangan MH370 berada dalam milikan, jagaan atau kuasa defendan-defendan. Ia selanjutnya dihujahkan bahawa plaintif-plaintif mempunyai sebab untuk mempercayai defendan-defendan mungkin telah membuang, menyembunyi atau memusnahkan dokumen-dokumen tersebut. Isu-isu untuk pertimbangan mahkamah adalah sama ada permohonan itu adalah pramatang; sama ada plaintif-plaintif hanya memancing untuk keterangan; sama ada permohonan plaintif-plaintif harus gagal atas alasan prosedur kerana tiada afidavit sokongan; dan sama ada alasan-alasan permohonan tanpa asas kerana kenyataan interim yang mengandungi fakta-fakta mencukupi telahpun dikeluarkan.

Diputuskan, membenarkan permohonan dengan kos:

(1) Defendan pertama tidak mempli bahawa artikel 21(2) Konvensyen Montreal 1999 ('konvesyen tersebut') boleh terpakai. Defendan pertama kelihatan telah menyimpan kedudukannya berhubung sama ada kemalangan itu bukan akibat apa-apa kesalahan di pihaknya, atau adalah akibat kesalahan pihak ketiga. Oleh itu, penzahiran yang dipohon tidak relevan atau perlu bagi tujuan menentukan liabiliti defendan pertama.

Namun begitu, tuntutan plaintif-plaintif terhadap defendan-defendan ketiga hingga kelima tidak dibuat di bawah konvensyen tersebut, oleh itu penzahiran boleh diperintahkan terhadap defendan pertama setakat mana ia berkaitan dengan dokumen-dokumen yang relevan untuk kes plaintif-plaintif terhadap defendan-defendan ketiga hingga kelima (lihat perenggan 10–11).

(2) Berdasarkan kenyataan tuntutan plaintif-plaintif, terdapat fakta dipli yang mencukupi untuk menunjukkan bahawa plaintif-plaintif memang mempunyai kes yang mungkin boleh dibantu oleh perintah penzahiran, dan itu, akibatnya permohonan untuk penzahiran bukan hanya amalan memancing. Corak fakta menunjukkan bahawa kes plaintif-plaintif bukan hanya spekulasi. Dalam memeriksa kerelevanan atau kepentingan permohonan untuk penzahiran kepada suatu fakta yang menjadi isu, kes plaintif-plaintif harus dianggap sebagai benar (lihat perenggan 15 & 17).

(3) Tiada keperluan di bawah A 24 k 3 KM untuk pemohon mendeposkan afidavit sokongan bagi permohonan penzahiran am. Dalam apa-apa keadaan, plaintif-plaintif telah memfailkan notis niat mereka untuk merujuk kepada afidavit-afidavit sokongan dan jawapan relevan yang telah difailkan berkaitan dengan permohonan untuk penzahiran spesifik (lihat perenggan 20).

(4) Selain daripada kenyataan iterim itu, semua maklumat relevan yang mungkin boleh digunakan bagi menentukan liabiliti defendan-defendan telah atau patut berada dalam milikan, jagaan atau kuasa defendan-defendan. Kenyataan interim itu sahaja tidak mencukupi untuk plaintif-plaintif meneruskan perbicaraan. Ujian yang boleh terpakai untuk menentukan sama ada atau tidak penzahiran patut diberikan dinyatakan dalam kes *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96: mesti terdapat 'document', dokumen itu mesti 'relevant' dan ia mesti atau telah berada dalam 'possession, custody or power' pihak terhadap orang yang mana perintah untuk penzahiran dipohon. Mahkamah berpendapat bahawa permohonan plaintif-plaintif telah memenuhi ujian ini (lihat perenggan 22 & 24).]

Notes

For cases on application for discovery, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 3140–3170.

Cases referred to

Kenwood Electronics (Malaysia) Sdn Bhd v People's Audio Sdn Bhd & Ors [2003] 5 MLJ 276, HC (refd)

Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (t/a JB International) [1990] 2 MLJ 282, HC (refd)

WA Pines Pty Ltd v Bannerman (1980) 30 ALR 559, FC (refd)
Yekambaran Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581, HC (folld)

Legislation referred to

Carriage by Air Act 1974
Malaysian Airline System Berhad (Administration) Act 2015
Rules of Court 2012 O 24 rr 3, 7A

Tommy Thomas (Ganesan Nethi with him) (Tommy Thomas) for the plaintiff.
Saranjit Singh (Hoe Mei Lei and Dhiya Damia with him) (Saranjit Singh) for the first defendant.
Kumaran (Sanjeev Kumar) for the second defendant.
Alice Loke (Senior Federal Counsel, Attorney General's Chambers) for the third, fourth and fifth defendants.

Azizul Azmi Adnan JC:

INTRODUCTION

[1] The plaintiffs in this case made an application for both general and specific discovery against the defendants. In the course of oral submissions, Mr Tommy Thomas, learned counsel for the plaintiffs, deferred his application for specific discovery in encl 11 until after the disposal of the application for general discovery in encl 10. Accordingly, this judgment deals only with the application for general discovery.

[2] This case arises out of the disappearance of a Boeing 777 bearing the registration No 9M-MRO and flight code MH370 on 8 March 2014. The first defendant was the former operating entity of the national carrier, whose business has since been transferred to the second defendant pursuant to the Malaysian Airline System Berhad (Administration) Act 2015.

THE PLAINTIFFS' APPLICATION

[3] The plaintiffs' application in encl 10 was made pursuant to, inter alia, O 24 r 3 of the Rules of Court 2012, which is reproduced below for ease of reference:

> Order for discovery (O 24 r 3)
>
> (1) Subject to the provisions of this rule and of rules 4 and 8, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power and may at the same time or

A subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(2) (There is no paragraph (2))

(3) (There is no paragraph (3))

B (4) The documents which a party to a cause or matter may be ordered to discover under paragraph (1) are as follows:

(a) the documents on which the party relies or will rely; and

(b) the documents which could:

C (i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

D **[4]** The plaintiffs' application for general discovery cited the following grounds in support:

(a) that the plaintiffs are in the position of information paucity, as all the E documents pertaining to the disappearance of MH370 were in the possession, custody or power of the defendants; and

(b) the plaintiffs have reason to believe that the defendants may dispose of, conceal or destroy such documents.

F THE LAW RELATING TO DISCOVERY

[5] In order to succeed in their applications, the plaintiffs must establish the three essential elements identified by the Edgar Joseph Jr SCJ (delivering the G judgment of the High Court) in *Yekambaran Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581:

> The essential elements for an order for discovery are threefold; namely, first, there must be a 'document', secondly, the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the party H against whom the order for discovery is sought.

[6] Guidance as to whether a document sought is relevant is found in the following passage of the Singapore High Court case of *Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (T/A JB International)* [1990] 2 MLJ 282:

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> Under a general order of court for discovery, a party is obliged to make discovery of all documents relevant to the matters in question in the action. What are the matters in question would depend on the pleadings. A document relates to the matter in question in the action if it contains information which may — not which must —

either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train of inquiry which may have either of those two consequences: see *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at p 62. Documents relate to matters in question in the action so long as they are likely to throw light on the case: see *Merchants' & Manufacturers' Insurance Co Ltd v Davies* [1938] 1 KB 196 at p 210.

[7] The defendants raised a number of different grounds for resisting the application for general discovery. I deal with these grounds in turn in the following paragraphs. Other grounds were also raised in submissions to resist the application for specific discovery. Since the application for specific discovery has been deferred by the plaintiff, I do not propose to deal with those other grounds here.

WHETHER APPLICATION WAS PROCEDURALLY WRONG/PREMATURE

[8] It is common ground that the liability of the first defendant is governed by the Montreal Convention 1999, applied in Malaysia by virtue of the Carriage by Air Act 1974 (as to whether it provides an exclusive cause of action against a carrier: see para 12).

[9] It was advanced for the first defendant that the application was in error as a matter of procedure and/or premature and that the discovery was not relevant for the purposes of ascertaining liability at this stage in the proceedings. Mr Saranjit for the first defendant argued that the first defendant had not yet elected whether to avail itself of a defence under article 21(2) of the Convention. Until such time, the liability of a carrier for the death of a passenger under the Convention was strict, provided that it is shown that the accident which caused the death took place on board the aircraft or in the course of any of the operations of embarking or disembarking. In the present case, it is not in dispute that these preconditions (which are imposed under article 17(1) of the Convention) have been fulfilled. Thus — argued Mr Saranjit — until and unless the first defendant makes this election (and amends its pleadings as a consequence), discovery is not relevant or necessary, for the plaintiff does not have to prove the liability of the second defendant in order to be successful in its claim. Under article 21(2), a carrier that disputes liability in excess of 133,000 SDRs (special drawing rights, which is best understood as a notional currency whose value is determined by reference to a basket of currencies) bears the burden of proving that the damage was not due to its negligence or other wrongful act or omission or that the damage was solely due to the negligence or other wrongful act or omission of a third party.

[10] Having examined the first defendant's defence, I am of the view that it has not pleaded that article 21(2) applies. In other words, the first defendant appeared to have reserved its position on whether the accident was not the result of any fault on its part, or was the result of the fault of a third party. Therefore, I would agree with Mr Saranjit that, as currently pleaded, the discovery sought would not be relevant or necessary for the purposes of ascertaining the liability of the first defendant; such liability is strict, and unless and until the first defendant amends its pleadings to state that the damage was not due to its negligence or other wrongful act or omission or that the damage was solely due to the negligence or other wrongful act or omission of a third party, discovery would not be relevant for the purposes of ascertaining the liability of the first defendant under the Convention.

[11] However, the plaintiffs also claim against the third to fifth defendants: the Director General of the Civil Aviation Department, the Royal Malaysian Air Force, and government of Malaysia. These claims are not made under the Convention. Discovery could therefore be ordered against the first defendant in so far as they relate to documents that are relevant for the plaintiffs' case against the third to fifth defendants. This is because the ordinary rules applicable in general civil proceedings apply in respect of the claims against the government-related defendants. Liability for these defendants is not strict, and will have to be proven in the conventional manner, with the plaintiff having to bear the burden of proving its case.

[12] Mr Thomas for the plaintiffs also contended that there is a line of United States authorities for the proposition that the Convention does not oust or supersede, or does not completely oust or supersede, common law causes of action. I consider that it will not be necessary for me to answer this question at this stage in proceedings, as I have found that discovery may be ordered against the first defendant in respect of the plaintiffs' causes of action against the third to fifth defendants.

WHETHER THE PLAINTIFFS ARE MERELY FISHING

[13] Both Ms Loke, the senior federal counsel appearing for the third to fifth defendants, and Mr Saranjit argued before me that the plaintiffs' application was a mere fishing expedition, trawling for evidence to be used in support of their claims. Such an application ought not be countenanced by the court:

> The court would dismiss a plaintiff's application for discovery if it is of the view that the plaintiff was 'merely fishing for evidence to prop up his case' and to allow him discovery would be unduly oppressive to the party giving discovery — see *Leslie S Holmes v Engineering Service Inc* [1993] 1 AMR 27 at p 36, *Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40, CA.

[14] An explanation of what amounts to impermissible fishing is contained in the decision of the Federal Court of Australia, exercising its appellate jurisdiction, in *WA Pines Pty Ltd v Bannerman* (1980) 30 ALR 559:

> Though the power to require discovery be acknowledged, how should it be exercised? It depends upon the nature of the case and the stage of the proceedings at which the discovery is sought. In the present case, discovery is sought before there is a tittle of evidence to suggest that the Chairman did not have the requisite cause to believe which para 6 of the statement of claim would put in issue. Some assistance was sought to be derived from cases where discovery had been given to a party before he was required to give particulars of his claim: cases such as *Ross v Blake's Motors* [1951] 2 All ER 689, but in cases of that kind there is either an anterior relationship between the parties which entitles one to obtain information from the other, or *sufficient is shown to ground a suspicion that the party applying for discovery has a good case proof of which is likely to be aided by discovery*. This is not such a case. *This is a case where a bare allegation is made by para 6 of the statement of claim and, the paragraph being denied, the applicant seeks to interrogate the Chairman and ransack his documents in the hope of making a case. That is mere fishing*. As Smithers J said in *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* , (5 TPC at p 35; ATPR at p 18,087: 'In the absence of such evidence the proceeding is essentially speculative in nature. In such circumstances for the court to assist the applicants by making available to them the processes of interrogatories and discovery would be to assist them in an essentially fishing exercise and from this the court on established principles should refrain'. His Honour's refusal of discovery was right and it ought not to be disturbed. (Emphasis added.)

[15] Having examined the statement of claim of the plaintiffs, I am of the view that there are sufficient pleaded facts to show that the plaintiffs do in fact have a case that may be aided by an order of discovery, and that, as a consequence, the application for discovery is not a mere fishing exercise.

[16] By way of example, the statement of claim narrates the following fact pattern: at 1:21:13 MYT on 8 March 2014 disappeared from the civilian radar system operated by the Kuala Lumpur Flight Information Centre, which is supervised and controlled by the Department of Civil Aviation. At 2:15 MYT, the first defendant's operation control centre informed the Flight Information Centre that MH370 was able to exchange signals and that it was flying in Cambodian airspace, information that is now thought to be incorrect (based on the preliminary report on the accident issued by the Ministry of Transport). Despite the fact that the last contact with MH370 was at approximately 1:20 MYT, the Flight Information Centre only activated the Kuala Lumpur Aeronautical Rescue Co-ordination Centre at 5:30 MYT, which in turn only issued a distress message for MH370 approximately one hour later.

[17] In my judgment, this fact pattern shows that the plaintiffs' case is not mere speculation. In examining the relevancy or materiality of the plaintiffs' application for discovery to a fact in issue, the plaintiffs' case must be assumed to be true: see *Yekambaran*'s case, where His Lordship cited with approval the following passage from *The Principles and Practice of Discovery* by Edward Bray:

> ... for the purpose of testing the materiality of the discovery to a particular issue ... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.

[18] The case of *Kenwood Electronics (Malaysia) Sdn Bhd v People's Audio Sdn Bhd & Ors* [2003] 5 MLJ 276 was cited in support for the contention that the plaintiffs' application for discovery ought to be dismissed. In my view, that case can be distinguished on the facts. The ratio of that case is that no discovery ought to be ordered if the effect of compelling the defendants to disclose and produce the documents sought would be to reverse the legal burden of proof. In the present instance, compliance with an order for general discovery would not have such an effect.

NO AFFIDAVIT IN SUPPORT

[19] The first defendant contended that the plaintiffs' application must fail on a procedural point, as the application was not accompanied by an affidavit in support.

[20] In my judgment, there is no requirement under O 24 r 3 of the Rules of Court 2012 for an applicant to depose an affidavit in support of an application for general discovery under O 24 r 3, unlike an application for specific discovery under O 24 r 7A. In any event, the plaintiffs have filed a notice of their intention to refer to the relevant supporting and reply affidavits that had been filed in connection with the application for specific discovery (which application the plaintiff has now deferred).

WHETHER GROUNDS FOR APPLICATION BASELESS

[21] Ms Loke for the third to fifth defendants contended that the grounds upon which the plaintiff sought discovery were without basis. According to her, there are ample facts contained interim statement dated 8 March 2015 issued by the Malaysian International Civil Aviation Organisation Annex 13 Safety Investigation Team for MH370, which was appended as an exhibit in encl 24. Thus, according to counsel, the plaintiff is not in a position of information paucity.

[22] In my judgment, apart from the interim statement, all relevant information that could possibly be used to determine the liability of the

defendants are or should be in the possession, custody or power of the defendants. Of course, the interim statement itself would not be sufficient for the plaintiff to proceed to trial. For instance, original documents will need to be adduced for the purposes of compliance with the rules of evidence.

[23] The second ground advanced by the plaintiffs contend that the defendants are likely to dispose of or conceal or destroy documents relating to the subject matter of this suit. Here, I am in agreement with Ms Loke that there is no credible evidence to substantiate this concern.

[24] Nonetheless, the applicable test for determining whether or not discovery ought to be granted is that set out in *Yekambaran*'s case: there must be a 'document', that document must be 'relevant' and it must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought. I am of the view that the plaintiffs' application fulfils this test. None of the objections raised by the defendants could be sustained, for the reasons that I have explained above.

[25] Application allowed, with costs to be in the cause.

Application allowed with costs.

Reported by Dzulqarnain Ab Fatar